No. 284.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES D. BYRNES, et al.

Appellants,

vs.

J. M. DOLLARLASS, et al.

Appellees.

BRIEF ON BEHALF OF APPELLEES.

Filed this ____ day of _____ 1930.

_____

Clerk.

F. M. HUFFAKER,

Solicitor for appellees.

FILED

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES D. BYRNES, et. al.,
Appellants.

vs.

J. M. DOUGLASS, et. al.,
Appellees.

BRIEF ON BEHALF OF APPELLEES.

May it please the Court :

This proceeding was commenced by Appellees in the District Court of the State of Nevada under a statute thereof entitled, "An Act to Encourage the Mining, Milling, Smelting or Other Reduction of Ores in the State of Nevada," approved March 1, 1875 (Statutes of Nevada, 1875, III, Gen. Stat. Nev., Sec's 256-273), to condemn a right of way for a mining tunnel seven and one-half feet wide by seven and one-half feet high from the Contact mine through five intervening mining claims and locations to wit: The Atlantic, Annie, Red Jacket, South End and Clinton, to the Goodman mine, and to appropriate so much of each of said intervening mining claims as is and will be necessary for the proper construction and maintenance of said tunnel.

Subsequently the appellants removed said proceedings into the Circuit Court of the United States, Ninth Circuit, District of Nevada, wherein such proceeding were had pursuant to said statute that said right of way was

the appellee took possession of it under his purchase of an interest in the Contact ground whereon is the mouth of the tunnel. At page 78. Trans., Douglass testifies; "There was a tunnel there that was badly caved down and in very bad shape. * * * It was of no use in the world to any of the mining claims for the purpose of working them, etc." And W. H. Stanley, an exceedingly willing witness for the appellants, was forced to say on cross examination, at page 98, Trans.,: "No mining man could go in that tunnel for the purpose of working the Atlantic ground without first repairing the tunnel." And this effectually disposes of all that Stanley implies in testifying to what he did under his lease of the Atlantic mine with reference to that part of this tunnel on the Contact claim, so that the conclusion of the trial Court that this part of the tunnel had fallen into decay and ruin by non user is fully sustained by the evidence, and being thus, it was clearly subject to appropriation under the rights of Eminent Domain, conferred by said statute, which has been sustained by the Supreme Court of the State of Nevada.

Dayton vs, Seawell, 11 Nev., 364.

Overman vs. Corcoran, 15 Nev., 147, in accord with Lewis, on Em. Dom., Section 1, 184, and Mills on Em. Dom, Section 20.

Upon this witness Stanley is appellants reliance to establish the fact that at the time appellee Douglass purchased the Contact mine he was a tenant of Byrnes and Mulville, and Stanley held the Contact ground for Byrnes and Mulville, for the reason, solely, that Stanley, while holding a lease from the Atlantic Consolidated

appropriated to the use of appellees, (Transcript, p. 41.)

To review this judgment of the Circuit Court, appellants appeal to this Court by a "Bill of Exceptions and Statement." Transcript 42-136.

The first objection of appellants (Trans, 42-3) is that the evidence showed that a part of this right of way sought to be condemned consisted of a tunnel which was owned by James D. Byrnes and Edward Mulville; that J. M. Douglass was, when the proceedings were commenced, in possession of said tunnel as tenant of said Byrnes and Mulville, and that said tunnel was already used by appellants, Byrnes and Mulville, for mining purposes and that it could not be condemned under the said Act of the State of Nevada.

This objection is not well taken as we contend the evidence does not show that appellants were, or had been for many years, using any part of said tunnel, nor that said J. M. Douglass was a tenant of Jas. D. Byrnes and Edward Mulville.

J. F. Angell (Trans. p. 105-6) testified he had lived thirty-three years in Silver City, and knew the tunnel in controversy, and the Contact mines ever since the Fall of 1860 or 1861, (and we here observe that this property is in the Devil's Gate & Chinatown Mining District, Lyon County, Nev.) That in 1865 McGinnis and Buzan worked in this tunnel and ran it for water; that he never saw any work done in this tunnel after 1877. To the same effect is the testimony of J. B. McJilton (Trans 107), and so regarding the testimony of L. S. Lacrouts, (Trans. 71.) and there is no testimony to the contrary. This is borne out by the condition of this part of the tunnel when

Company to the Atlantic mine, a separate and distinct mining location and claim from the Contact, and at the time said lease was made the Atlantic Company, lessor, had no interest in nor made any claim to the Contact mine, and did not attempt to lease the Contact to Stanley, bought the Contact

We contend that a lessee takes what the lease specifies, and nothing else, and if he enters upon other property than that leased his entry is tortious and does not bind the lessor; We also contend that a leasehold estate is separate and distinct from the fee. Therefore the contention of appellants that Byrnes and Mulville, by reason of succeeding to the title of the Atlantic mine through an execution sale in an action of J. D. Blackburn vs.the Atlantic Consolidated Company, succeeded to the leasehold estate therein of W. H. Stanley, is not law.

At the time this lease was given, March 22, 1890, C. E. Brown had not relocated the Contact ground. (Trans., top page 46,) which shows that Brown relocated the Contact ground in July, 1890, three months after Stanley took possession of the Atlantic mine under his lease thereof, and yet he would have us believe, or rather infer from his testimony that when he took this lease he found Brown in possession of the Contact, when it was three months after when Brown relocated the Contact under the laws of Congress, and on the 13th day of June, 1891, (Trans., p. 46,) a year after his lease, Stanley bought the Contact mine from the locator C. E. Brown, for whom? Trans. p. 96-97, Stanley testified, in a suit in the State District Court: "I simply bought him

(Brown) out for myself and for Mr. Millievich," and when Mr. Stanley sold this mine to Mulbeyer he simply sold it for himself. All these transactions we claim show that at that time no one thought of the Atlantic Company having any interest in the contact ground, and under such circumstances, we take it, this Court will not disturb the trial Court and commissioners in their conclusion, when they not only had the opportunity to observe the witness when testifying and his manner, but the opportunity of comparing it with all the other testimony.

Appellee Douglass testifies that the lease of the Atlantic mine had nothing to do with his purchase of the Contact mine; that he took possession of the Contact mine under his purchase, not under the lease, and that at the time he purchased the Contact he did not know the Atlantic Company claimed any interest in it, consequently he is an innocent purchaser for value without notice.

The Atlantic Company at one time owned the Contact ground under the name of the Cadiz, and while owning and possessing it and the Atlantic mine, the Atlantic Company applied for a U. S. patent for the Atlantic mine, but did not include in its application the Cadiz, now Contact ground, and evidently after securing a patent to the Atlantic mine, allowed the Cadiz location to revert to the United States, to be appropriated by the next comer, which was done by Thos. P. Mack, a Surveyor and Civil Engineer and County Recorder of Lyon County. Trans., p. 50.

Appellants, while admitting the Cadiz claim, was lost

to the Atlantic Co., and that T. P. Mack acquired it by his location some six years since, and he failing to do the necessary annual work, C. E. Brown, appellee's predecessor in interest, became the owner of the ground, claim that part of the tunnel on the Contact ground remained the property of the Atlantic Co., as an appurtenant to the Atlantic mine. I cannot see upon what principle or rule of law such a proposition can be maintained.

There is no Statute of the State of Nevada, nor any local regulation, rule or custom of the Devil's Gate and Chinatown Mining District governing tunnels or tunnel rights. Then any such right must depend upon the laws of Congress, which provide: "Where a tunnel is run for the development of a vein or lode for the discovery of mines, the owners of such tunnel shall have the right of possession to all veins, etc. * * *; but, failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right, etc."

Sec. 2323, Rev. Stats., U. S., and the Act of Feb. 11, 1875, amending Sec. 2324, U. S. Rev. Stats, allowed work done in a tunnel, run for the purpose of developing a lode, to be considered for holding purposes as done on the lode. To secure the benefits of this law, tunnel claimants are required to post a notice of the tunnel location and stake out the tunnel course on the surface, and record such notice in the County Recorder's Office. There is no pretense that any of this was ever done by any one, except Appellee Douglass, after he took possession of the Contact mine, hence appellants or the At-

lantic Co. can claim no tunnel, nor did any work in this Contact tunnel for years prior to the purchase by Douglass.

We must bear in mind that this Contact tunnel was not run to develop any lode, or to discover any mine, but as Angell and Lacrouts say, for water. And, as Lacrouts says, was used for furnishing water for Silver City, until the organization of the Gold Hill and Virginia Water Company, when the tunnel occupants sold out to said company; and, as there is nothing in all the records to controvert this, is it not to be taken that whatever tunnel rights the owners had vested in the Gold Hill and Virginia Water Company?

Let us consider another proposition. If an owner of a mine goes outside the boundaries of his claim upon the unappropriated public mineral lands of the United States and starts a tunnel and runs it through unappropriated land into his mine, and afterwards, by non use, allows such tunnel to fall into decay, and while in such condition, another citizen locates a mine under the laws of Congress, taking so much of the tunnel as is on public mineral land, does he not, by virtue of his lacation, acquire the right to any tunnel, shaft, adit or cut on or in his location? If a man locates a mine and sinks a shaft to a depth of a thousand feet and allows thereafter his claim to become forfeited, and another locates it, does not the shaft go with the claim?

In mining, a tunnel may be said to be a horizontal shaft.

The objection of appellants that we have appropriated to a public use that which has already been appropriated

to the same public use, does not apply. This has reference to an appropriation in the exercise of the rights of Eminent Domain, but appellants do not claim they have any such right, hence are not within the perview of the authorities relied upon by them, but take any view we may, the condemnation of this tunnel right of way through these different mines cannot be questioned.

Mills on Em. Dom., Sections 44, 45, 47; Lewis on Em. Dom., Section 276; Rochester Water Commissioners, 66 N. Y., 413: N. Y, Central R. R. Co. vs. Metropolitan Gas Co., 63 N. Y., 326, Morris and Essex R. R. Co. vs. Central R. R. Co., 31 N. J. L., 213; Peoria, P. and J. R. R. Co. vs. Peoria and S. R. R. Co., 66 Ill., 174;

N. Y. L. and W. Railway Co., 99 N. Y., 13.

The contention of appellants that the Atlantic Company, many years since, went into this water tunnel and for a time worked the Atlantic mine, dedicated this part of the tunnel on the Contact ground to the public use of mining mentioned in the said Statute, is not in accord with fact or law, for whatever may have been the rights of said Company, while in the actual use and occupation of this tunnel, the moment the Company ceased such use, such rights were lost, and as Angell says, Trans. 106: "I don't think Yule done anything in the old tunnel in 1887. Yule came there about that time, * * *, went Below and came back and went to work running a new tunnel. He said when he came back that his business Below was to consult the Company about its being better to run a new tunnel than to clean out the old one, and when he came back he went to work running a new tunnel, and did not

work in the old tunnel. I never saw any work done in the old tunnel after the time Matt Canavan put men to work in there to secure the ground in 1877." This conclusively negatives any right of appellants now to claim this Contact part of the tunnel, either as an appurtenant to the Atlantic mine, or as used by them for working said mine, for it clearly appearing that the Atlantic Company abandoned so much of this tunnel as is on the Contact ground, "the successors of the corporation cannot assert a right to the property, etc."

Randolph on Em. Dom., latter part of Section 216, also Sec. 219 shows there cannot be a public use of property except through condemnation proceedings.

II.

The second and third objections to the confirmation of the Commissioners report, Trans., p. 111, may be considered together. These objections are that the Commissioners failed to assess any compensation for the undivided one-fourth of the tunnel on the Contact mine, also for the right of way through the Annie, Red Jacket and Clinton claims.

In considering these objections we must bear in mind the testimony before the Commissioners showed conclusively that there was no value to these claims when Douglass took possession of this tunnel, that whatever value they now have attaches by reason of his having run the tunnel through them, that seven and one-half feet through them are valuless.

On this question T. P. Mack, Trans., 52, testifies: "These several mining claims had no marketable value

in 1890, unless the Red Jacket and the Atlantic had ore that was developed in their former workings, and their value would be entirely speculative according to my idea. I don't think the marketable value of the Atlantic has been changed; I should say the same was worth more today with the tunnel; it is worth more now than it was before the ore was exposed in it, and I would say the same with reference to the Red Jacket and Clinton. A mine is usually considered more valuable, and you can sell it to a better advantage, if you can go and show ore in it that will pay. It is my judgment that the running of that tunnel has benefited those mines * * *. When the tunnel was half way through the Annie, the land was unappropriated and vacant and subject to location by anyone, and it had no marketable value, and I would say the same of the Clinton; the Red Jacket was a mine for a long time and the parties had a perfect title to it. The damage to that mine would be the amount of pay ore taken out. I would pay more for those three claims now than I would before the tunnel was excavated through them. I can see no damage can result to the Annie by the appropriation of 7½ feet square of ground as a right of way for the tunnel, or to the Jacket or Clinton."

J. D. Blackburn, Trans., 61: "Leaving the question of ore taken out by the excavation of the tunnel, it is worth nothing for right of way through the claims through which the tunnel runs seven and one half feet square. If I was interested in those mines through which the tunnel runs, I would say it done me good to run the tunnel if they found anything, and if they found nothing it could do me no harm, because there is noth-

ing there, and it might save me money trying to find out something myself. The tunnel run through these was an advantage to those mines, because it developed their property without expense to the owners. The running of the tunnel was worth to the owners of the mines through which it ran about ten times what the value of the ore taken out by the tunnel was. There was nothing there to take out to amount to anything," and to the same effect at pages 66-67.

F. S. Lacrouts, Trans, 71. "Since the tunnel has been run they have been in there and took some ore out, and the value of those mines is better than betore the tunnel was run. I think the tunnel cost more than the rock was worth that was taken out. The tunnel adds more to the value of the mines through which it runs than the ore taken out in running the tunnel," and on page 72; "I think the benefit derived by these claims from the running of the tunnel is more and of greater value than all the value of the ore that may have been taken out by the running of the tunnel."

J. M. Douglass, Trans., 79. "In my view, prior to Sept. 1891, the mining claims on the line of this tunnel as mining properties had no value whatever."

R. C. Hunt, Trans., 130: "I would not fix any value for the 7½ feet square of ground through the Annie, or the Clinton or the Red Jacket for the right of way of the tunnel; I don't think it is of any value."

I submit this is the evidence upon this question upon which the Commissioners had to act. That the testimony of Lamb, Powers, Purdy, Biggs and others for the appellants does not controvert this. That the Commis-

sioners knowing all the witnesses, hearing their testimony, being themselves mining men and examining, under the Statute, the property in question, fully complied with their obligation in reporting as they did.

The attempt of appellants to prove to the Commissioners the value of the right of way was by such testimony as counsel called for, as given by Mr. Lamb, Trans., 112, to the egect that in his opinion it would cost $3,000 to run the first 250 feet of the tunnel and $1,600 to run the rest of the tunnel.

E. T. Powers, same page, says it would cost $3,000 to run the first 350 feet of the tunnel, and $1,500 to run the rest of the tunnel, and yet they complain because the Commissioners did not find this 7½ feet of these claims of some money value.

That cost is not an element of value, for compensation in condemnation proceedings we refer to

New York W. and S. R. R., 37 Hun., 317.

Miflin Bringe vs. Juniata County, 144 Pa., 36.

San Antonio and A. R. vs. Ruby, 80 Tex., 172; referred to in Sec. 235, Randolph on Em. Dom. In Sec. 8 of Art. 1 of the Constitution of Nevada, it is said, "Nor shall private property be taken for public use without just compensation having been first made or secured." Under this, appellants contend, that in appropriating property in Nevada, under the right of Eminent Domain, the Commissioners must find some money value, although, in fact, there may be no value proved, or the evidence before them may conclusively show there is no money compensatory value. While in Section 223, Randolph on Em. Dom., it is said: "The word 'just,

full,' 'adequate,' 'due,' or reasonable prefixed to 'compensation' in Constitution or Statute does not carry any definite weight." The Supreme Court of Nevada in V. and T. R. R. Co. vs. Henry, 8, 173, says the word 'just' in Nevada's Constitution is used to intensify 'compensation,' "to convey (the Court say) the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample." so the Supreme Court of Nevada, have evidently settled the rule in that State, to be, whenever there is an "equivalent," full and ample rendered the owner by the taking, this is compensation, whether that equivalent be money, or other thing, and this is clear from what the Court in the same case again say, in commenting on evidence of value, to wit: "This was based upon or approximated the basis of the rule, which is clearly summed up by the text writers thus: 'It has been said the appraisers are not to go into conjectural and speculative estimates of consequential damages, but confine themselves to estimating the value of the land taken to the owner. This is most readily and fairly ascertained by determining the value of the whole land without the railway, and of the portion remaining after the railway is built. The difference is the true compensation to which the party is entitled." And as to how the Commissioners are to arrive at this, the Court in referring to the conflicting testimony in that case, where the witness made various estimates of compensation, fourteen, thirteen and four hundred dollars, and the Commissioners found one thousand, say: "There was a conflict, but no such conflict as of itself would warrant a District Court in setting aside the verdict of a jury because

against the weight of evidence. It must be remembered that these Commissioners are not on question of fact confined and limited as a jury. They hear and weigh the allegations of the parties; they view the premises, and are supposed to exercise their own judgment to some extent irrespective of evidence; and into their conclusions enter elements or calculation which it is hard to estimate, but which are of sufficient importance to deter a District Court, even in absence of Statutory prohibition, from lightly setting aside a report so made. Under the Statute, it can only be done "upon good cause shown therefor." What that good cause shall be can with safety be held something clear and indubitable, pointing error in law or fact, or both, intentional or unintentional on the part of the Commissioners.

Piper's Appeal, 32 Cal., 530; St. Louis and St. Joseph R. R. Co. vs Richardson, 45 Mo., 466." Again, "As this Court said in another case and iterates now, which affirmance it is hoped may be regarded as a settlement of the question: "If it be admitted that the testimony reported in the record preponderates against the conclusion of the Commissioners on this point, it cannot be said in any view that may be taken of it, that the preponderance is so great and decided as to justify an interference with the report. There is testimony, decided and substantial, in support of it, and furthermore, under the Statute the Commissioners are required to examine and view the land for themselves' which was done in this case; and thus their opinion of its value is added to the testimony of the witnesses on behalf of the respondent. Under such circumstences the decision of the

Commissioners will not be set aside, if there be any substantial testimony to support it. Such is the rule repeatedly, and we think, uniformly followed. * * *. This case very clearly comes within this rule, and hence the report can not be disturbed. The Virginia and Truckee R. R. Co.vs. Flliot, 5 Nev., 358."

This is the law of Nevada, under which the Commissioners in the case at bar acted.

That there is evidence, abundant, substantial and convincing in favor of the report herein appealed from, there can be no question. Angell, Lacrouts, Neligh, Mack, Hunt and Douglass all testified that at the time, and long prior thereto, when appellees ran this tunnel, none of these claims had any value, and it must be borne in mind that these are all well acquainted with this kind of property and its value, to which must be added the opinion of the Commissioners, under the Statute, for they report they examined this tunnel, consequently their conclusion is from their own investigation and all the testimony before them, which showing that these claims have no market value, as a whole, and that when this $7\frac{1}{2}$ feet for this tunnel were taken by these appellees the construction of the tunnel gave each claim a substantial value it never before had, and that the mine, as a mine, is to the owner more valuable than before, and the tunnel cannot possibly damage any of these claims, can it be said, as matter of law, that the Commissioners report is wrong ?

I take it this Court will consider the construction the Nevada Supreme Court places upon its Constitution and Statute concerning this question.

By what other rule were the Commissioners to be

governed? When their own Supreme Court in V. & T. R. R. vs. Henry, Supra, had said, compensation is an equivalent, not merely market value, although when applicable the general rule, where part of a tract is taken the measure of compensation is the depreciation in the market value of the whole tract by reason of the taking, but if there is no depreciation, but a decided enhancement, and the owner is in no respect damaged another rule governs; the equivalent, or as is said in Selma, R. and D. R. R. Co. vs. Keith, 53 Ga., 178: "In a case like the present, where under the evidence given in the cause, the actual damages proved is to land taken for railroad purposes, and as the road is located over the farm of the plaintiff, when you come to consider the actual damages and also to inquire into the attendant advantages and disadvantages, a proper rule for your government is thus laid down by our Supreme Court in the case of Railroad Co. vs. Heister, 8 Barr., 450: "A fair and just comparison of the value of the tract through which the road passes before and after the improvement is made,—is the property benefitted or injured by the improvement"—is a most material inquiry. If benefitted, the owner neither is, nor ought to be entitled to recover any compensation whatever; if really injured (not a mere fanciful injury) and we add, not a mere supposed injury dependent upon a contingency or uncertainty, as already explained to you, compensation is to be given to the amount of the injury sustained by the owner. In coming to your conclusion you may properly inquire what the property would sell for before and after the improvement, etc." This was in the

charge of the trial Court to the jury, and sustained on appeal. True, these are railroad cases, but the principle applies with greater force to mining tunnels, for it is common knowledge in mining communities that a tunnel through a mining claim is always beneficial, and the great difficulty is to get tunnels run, as it requires money to run a mining tunnel. The foregoing also answers appellants fourth objection to the confirmation of said Commissioners report. The fifth objection, Trans., 112–112, is that the Commissioners assessed the value of the old tunnel through the Atlantic ground at $1,021.95, and appellants say, "Being 394 feet in length. This is misleading, as the distance is 265 feet. (Trans., 32. So that this finding of the Commissioners can not be interfered with.

III.

The sixth objection, Trans., 113, is; "That no compensation is awarded by the Commissioners for the damages, * * *, by the wrongful acts" of appellants "in running the tunnel through the ledge in the right of way condemned, * * *, and in taking out the ore excavated in running the tunnel, and throwing it way instead of saving it for the owners thereof."

We first observe, that there was no wrongful act in running the tunnel, also, that the evidence shows there was no ore of value thrown away or wasted.

If it be conceded, as it must in this case, that in September, 1891, when Douglas commenced extending this tunnel, the Annie and Clinton claims were public, unlocated mineral land, and no ore bearing vein or lode

was known in any of the claims through which the tunnel ran. The most that under any circumstances could be claimed is, had Mr. Douglass found any pay ore within the excavation thereof he should have saved it for the owner of the mine wherein found, not that there would be any wrong in taking out any ore encountered. And in this proceeding all the Commissioners were concerned with was to ascertain whether he had taken out any pay ore: if so, of what value and what he did with it. If he took out any and preserved it for the owner, under this objection the report of the Commissioners is correct. What evidence had the Commissioners on this question? W. H. Neligh, who ran this tunnel, a practical miner, testified, Trans., 118' et. sequa., that Mr. Douglass's ininstructions were to save all ore encountered worth saving, and that it was done. That throughout the length of the tunnel there was vein matter with a seam of pay ore in it, that is in spots' not continuous, that they found none on the Annie claim, and after minutely explaining everything near bottom of page 119, says: "The ore from the Red Jacket was dumped at the mouth of the tunnel on the side of the track, and most of it is there yet."

J. D. Blackburn, F. S. Lacrouts, J. F. Angell and E. D. Boyle, all mining men, testified that the ore encountered in the tunnel would not pay to mine. Trans., 117, Mr. Douglass testified he never directed any ore that would pay should be thrown away, also that the pay ore found in the Red Jacket is at the mouth of the tunnel for the owner, and when the Commissioners' also mining men, examined the premises they found this

testimony true, and for themselves saw that the Red Jacket ore was there, notwithstanding some witness pretended to say to the contrary, but in such a case, can the Court say the Commissioners were wrong? Certainly not, when appellants witness could give no satisfactory reason for the statement, nor did they show an intimate knowledge of the matter inquired about, as appears from their statements.

What is pay ore? Mr. Neleigh, Trans., 129, says: "When I say pay ore, I mean such ore as will yield a profit above the cost of mining and milling:" nor is this definition controverted, and when all the mining men who are competent to express an opinion, say such ore was not found within the tunnel, except in the Red Jacket, and that was saved, who is to say they are all wrong?

Let us examine such testimony for appellants as given by G. W. Debus, Trans., 112, where he says the value of the ore taken by the tunnel in the Annie is from $35 to $40 per ton, Red Jacket, $60 to $90; Clinton, $130 to $180 per ton. He was not there when the tunnel was run through the Annie consequently knew nothing about it; and as Hunt says, the ore was taken from the Clinton after the tunnel had been run, giving them an opportunity to get into the Clinton and take the ore, outside the tunnel limits, which they could not otherwise have done, as Neleigh says, without running a tunnel or sinking a shaft themselves. The Commissioners knew all the witnesses and how to estimate their testimony.

These are the exceptions upon which appellants rely for a reversal of this proceeding, which taken together

or singly, in view of the evidence, fail to show any reversable error.

IV.

There is no intimation in all the record that there was any ore taken out by those who formerly ran this tunnel the distance where Douglass found it in 1891, and the fact that the tunnel had been allowed to go to ruin and become utterly useless is proof positive there was nothing to lead any one to think in extending this tunnel ore would be encountered, but it was, in small bunches, and at such distances apart, that as an ore proposition it was valueless. This is clear from the testimony.

Let us assume that the evidence of appellants, that the remainder of each one of these claims is damaged by this tunnel right of way, equal to the value of the ore taken out in excavating the tunnel, by reason of the quantity of ore therein being that much less, then it would have devolved upon the Commissioners in estimating the compensation for the ore thus taken to consider as an offset to such value, those benefits beculiar to the residue of the claims, by reason of of the tunnel, even though such benefit should amount to a sum sufficient to cancel the whole compensation.

San Francisco A. and S. R. R Co. vs. Caldwell, 31 Cal., 367; Nichols vs. City of Bridgeport, 23 Conn , 189; Jones vs. Wells Valley R. R., 30 Ga., 43; Nicholson vs. N. Y. and N. H. R. R, Co., 56 A. Dec., 390; St. Louis J. and S. R. Co. vs. Kirby, 104 Ill., 345; Trinity College vs. Hartford, 32 Conn., 452; Gueis vs. Storn Mt. Grant Ry.,72 Ga., 320; Atlanta vs. Green, 67 Ga., 386; Elgin vs. Paton, 83 Ill., 535. Page vs. Chicago, Mn. and St.

Paul R. R., 70 Ill., 324; Ind. R. R. vs. Hunter, 8 Ind., 74; Witeman vs. Boston and N. R. R., 85 Mass., 133; Conn. vs. Middlesex, 9 Mass., 388, Winona and St. P. R. R. Co. vs. Waldron, 11 Minn., 575; Jackson vs. Waldo, 35 Mo., 637; Livingstone vs. Mayor of N. Y., 8 Wend., 85; Platt vs. Penn. Co., 43 Ohio State, 228; Putnam vs. Douglass Co., 6 Or., 328· Livermors vs. Jamaica, 23 Vt. 361.

This being the law, in the absence of Constitutional or Statutory requirements otherwise, of which there are none in the State of Nevada, what was the testimony before the Commissioners? Overwhelmning; that the benefit to the restdue of each claim is far in excess of all damage to the claim by reason of any ore that possibly could have been within the excavation of the tunnel, or for that matter, any other damage.

The consensus of the testimony is that not one of these claims had any value until after this tunnel had been run, exposing a mineral bearing vein before unknown to the owners, and it is a patent fact that had not Douglass taken possession of that abandoned, neglected, dilapidated and worthless tunnel, reconstructed and extended it, uncovering ore along its line, to this day all their claims would be as they have long been, unnoticed and unexplored.

Is there a single witness who pretends to say, that the ore within the excavation of this tunnel-way is in value equal to the cost of constructing the tunnel? Not one! Could there then be any value for the consideration of the Commisssoners? Certainly not under the well known maxim of miners, that ore is not valuable until it

pays a profit over all cost of obtaining it, including discount on any silver it may contain. And if, as abundantly testified to, all the ore excavated by the tunnel would not pay the cost of constructing it, it is safe to say it would not pay for mining, and it is no answer to this, for appellants to prove what, after Douglass had opened a way for them, they went through his tunnel to their claims and found by running drifts, sinking winzes or making upraises from the tunnel, as testified to. For without this tunnel they never would have done this, for the reason they did not know these claims had any value until after this tunnel was run, as appears from the testimony.

Thos. P. Mack, a witness for appellees, Trans., 54 says: "I don't think the value of all the ore taken out by the excavation of that tunnel would be as great as the increased value of the mines by reason of the ore discovered by the running of the tunnel." And so is the testimony of every one competent to express an intelligent opinion in reference to this question.

The general proposition governing this entire inquiry seems to be well expressed in Section 464, Lewis on Em. Dom., as follows: "When part is taken just compensation includes damages to the remainder—upon this point there is entire unanimity of opinion.

The Constitutional provision can not be carried out in its letter and spirit by anything short of a just compensation for all direct damages to the owner of the lot, confined to that lot. occasioned by the taking of his land. The paramount law intends that such owner, so far as the lot in question is concerned, shall be put in

as good condition pecunarily by a just compensation as he would have been in if that lot of land had remained entire as his own property. How much less is that lot and its erection thereon remaining worth to the owner as property, to be used or leased or sold, the day after the property was taken to be used for the purpose designed than the whole lot intact, was the day before such taking, etc."

In accord with which are:

Haynes vs. City of Duluth, 50 N. W. Rep., 663.

S. F. A. and S. F. R. R. Co. vs. Caldwell, 31 Cal., 368.

V. and T. R. R. Co. vs. Henry, 8 Nev., 165.

Mills on Em. Dom., Sec. 159.

Randolph on Em. Dom. Sec. 254.

3 Sutherlan on Damages, pages 432-3 and 4.

What could the Commissioners conclude other than they did with the evidence clearly establishing the fact that each one of these claims is worth far more with this tunnel than without it, and all these questions were particularly for the Commissioners to determine, for Section 8 of the Act under which they were appointed, being Section 263, Gen. Stats., Nevada, provides: "The said Commissioners shall proceed to view the several tracts of land, as ordered by said Court or Judge, and shall hear the allegations and proof of said parties, and shall ascertain and assess the compensation for the land sought to be appropriated to be paid by the petitioner, etc."

This certainly does not mean they must find some sum of money, whether there is any money value to the thing appropriated or not?

They are simply to find what the evidence warrants,

always with a view to substantial justice to all parties concerned. The whole proposition cannot be better expressed, than was by the trial Judge in his opinion, page 150, Transcript: "After a careful examination of the evidence it appears to my satisfaction that the appropriation of the right of way for the tunnel through the mining claims of the defendants to the Goodman mine will be of great benefit and advantage to the mining industry of Lyon County, where the claims are situated; that it is necessary to condemn the lands asked for in the petition for the protection and advancement of said interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss, damage or inconvenience to the defendants."

Evidently the Commissioners took the same view of the evidence. It must be always borne in mind that this proceeding is under an Act of the Legislature of Nevada entitlee, "An Act to Encourage Mining, Milling, Smelting or Other Reduction of Ores in the State of Nevada," approved March 1, 1872. Statutes 1872, 111, Section 1, (Gen. Stats., Nev., Sec. 256); "The production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor."

As before remarked this Statute has been upheld by the Supreme Court of the State of Nevada, also by the

U. S. Circuit Court for that District.

Douglass vs. Byrnes, 59 F., 56.

The "just compensation" of the Constitution always suggests the idea of value, consequently if there is no value to the property, or interest sought to be condemned, and no damage, but only benefit caused by the taking, there can be no compensation required. As the value and damage increase the compensation to the owner would necessarily be enhanced. As the value and damage decrease the compensation would be lessened, and there is no limit in law or reason, outside of evidence, to this decrease in value.

But suppose as to this there is some conflict in the evidence, this was to be reconciled by the Commissioners and the trial Court, and their conclusion, like the verdict of a trial jury, will not be disturbed on appeal.

Ray vs. Cowan, 44, P., 821.

Crosby Lumber Co. vs. Smith, 51, Fed., 63.

It would seem the same rule is applicable in a proceeding of this kind, as in admiralty respecting a report of a commission appointed to ascertain damages, which is to the effect that findings as to questions of fact depending on conflicting evidence should not be disturbed by the Court, unless error or mistake is clearly apparent.

Panama R. Co. vs. Napier Shipping Co. 71 Fed., 408.

And as we claim no error or mistake appears to have been made by the Commissioners or the learned Judge to whom they reported, we most respectfully submit that the Record herein shows no reversable error.

F. M. HUFFAKER,
Solicitor for Appellees.